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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78- 191

GEORGE E. FASSNACHT,

Petitioner

v.

PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

George E. Fassnacht respectfully petitions for a Writ of Certiorari to review the judgment of the Superior Court of Pennsylvania in the above-captioned case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania (Appendix 1-17) is reported at 369 A.2d 800. The order of the Superior Court denying rehearing (A. 19), and the orders of the Supreme Court of Pennsylvania denying allowance of appeal and denying reconsideration of allowance of appeal (A. 20) are not reported. The opinion of the Court of Common Pleas (A. 21-34) is not reported.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered February 18, 1977. A timely Petition for Reargument was denied on March 8, 1977. A timely Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on August 5, 1977. A timely Application for Reconsideration of Denial of Allowance of

Appeal was denied on April 4, 1978. By order dated June 21, 1978, Mr. Justice Brennan extended to August 2, 1978, the time for filing a Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

ISSUES PRESENTED

Did the judgment below, forfeiting property seized during a search, violate Petitioner's Fourth Amendment rights, as applicable under the Fourteenth Amendment, when (1) the property now at issue consisted of rifles, pistols and ammunition, all innocent in themselves if possessed as a weapons collection in Petitioner's home, (2) the forfeiture was ordered notwithstanding recognition by the Pennsylvania court that the prior decision suppressing the evidence required that all property except contraband per

se must be returned to Petitioner, and (3) the Pennsylvania court concluded that Petitioner's rifles, pistols and ammunition, were "contraband per se" because evidence obtained during the search, including the "nature, quality and manner of storage" of the items in Petitioner's basement, "indicated" that Petitioner was an unlicensed dealer within the meaning of the Gun Control Act of 1968, 18 U.S.C. §§ 921 et seq.?

Did the judgment below violate Petitioner's Fourteenth Amendment rights under the due process clause by determining (1) that Petitioner was an unlicensed dealer, without any evidence whatsoever to establish that Petitioner had done any act alleged to constitute dealing, even if all the evidence previously suppressed were considered, and (2) by establishing a presumption that mere possession of a quantity of property

is evidence of an intention to act as a dealer in respect of that property, notwithstanding Petitioner's uncontradicted denials of any transactions as a dealer?

Did the judgment below misconstrue the Gun Control Act of 1968 by adopting a definition of "unlicensed dealer" so broad as to reach many persons who possess quantities of weapons in their homes, contrary to the intent of Congress that gun collecting not be proscribed by the Act?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Gun Control Act of 1968, Public Law 60-618, § 102 82 Stat. 1214, 18 U.S.C.:

§ 921. Definitions

(a) As used in this chapter -

* * * *

(11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

* * * *

§ 922. Unlawful acts

(a) It shall be unlawful -

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

STATEMENT OF THE CASE

Petitioner George E. Fassnacht ("Petitioner") is a forensic ballistics expert and a collector of firearms. From 1962 through early 1967, he was a ballistics expert and firearms examiner with the City of Philadelphia Police Department, resigning his position in 1967 to accept employment with the federal Government as a firearms and ordnance expert. In 1968, Petitioner received a "permanent change of station" assignment to a location outside the United States and was entitled under applicable regulations to have his personal property packed and stored at Government expense. Petitioner arranged for Government packaging of his collection of firearms, but shortly before leaving the country in July 1968, Petitioner married and his wife moved into his family home in Philadelphia. Petitioner's firearms collection, still contained in the

Government-supplied packaging, was stored in the basement of the home, rather than being placed in storage at Government expense.

From 1951 through the time of Petitioner's departure overseas in July 1968, Petitioner held a federal license under the Federal Firearms Act of 1938, § 3, 52 Stat. 1251, to facilitate his activities as an expert and collector. During Petitioner's absence from the United States, the Gun Control Act of 1968, Public Law 90-631, 82 Stat. 1214, 18 U.S.C. §§ 921 et seq., was enacted, redefining the qualifications for federal licenses and requiring promulgation of regulations to implement the revised licensing procedures. In December 1968, Petitioner returned briefly to the United States on leave and orally discussed renewal of his license with an officer of the U.S. Treasury Department. Petitioner

was informed that under new criteria pursuant to the 1968 Act and as a non-resident, Petitioner was not eligible for renewal of his license. During the same month, Petitioner applied to the Treasury Department for registration of automatic weapons in his collection, pursuant to the statutory amnesty provisions of Section 207 of the 1968 Act, notwithstanding that the amnesty period had closed November 31, 1968, since he had been outside the United States during the entire thirty-day amnesty period. His eligibility for registration was determined in Petitioner's favor at the Washington office of the Alcohol, Tobacco and Firearms Division, with registration to be completed upon his return to the United States.

Petitioner next returned to the United States on June 24, 1971. Four days earlier, on June 20, City of Phila-

delphia police officers appeared at Petitioner's home and demanded of Petitioner's wife that they be admitted and allowed to search Petitioner's basement. Petitioner's wife declined to admit the police officers unless they obtained a search warrant. Notwithstanding her denial of consent, a large number of Philadelphia police, later joined by Treasury Department officers, searched the basement and removed Petitioner's entire firearms and ammunition collection. Petitioner was charged with three state criminal offenses triable in the Philadelphia Municipal Court. One charge, a felony, alleged possession of machine guns in violation of former 18 Pa. Stat. § 4629, repealed by 1972 P.L. 1482. The second charge alleged a violation of an 1856 statute regulating storage of gunpowder inside Philadelphia, 53 Pa. Stat. § 16570, 1856 P.L. 137, for which the

penalty is a fine of $500 "to be recovered . . . in an action of debt . . . to and for the use of the Philadelphia association for the relief of disabled firemen." The third charge was a summary offense punishable by a maximum fine of $100 for alleged violation of an explosives storage statute, 73 Pa. Stat. §§ 151-68, 1937 P.L. 2681.

Petitioner was tried in the Municipal Court. The prosecution presented its entire case, both in opposition to Petitioner's motion to suppress and on the merits. Petitioner presented evidence in support of his motion to suppress. The Municipal Court Judge determined that neither of the justifications for the warrantless search and seizure had been established, i.e., (1) Petitioner's wife had not consented to the search, and (2) no "emergency" justifying a warrantless seizure existed as

the result of the delivery to the basement, on the day of the search, of a quantity of black powder, the property of Petitioner which he had stored outside Philadelphia prior to his departure, and explosives belonging to another individual, both of which had been placed in the basement that day without Petitioner's knowledge or approval. The Municipal Court accordingly granted a motion to suppress all evidence resulting from the search of Petitioner's home and a related search at a different location on the ground that the search was in violation of the Fourth Amendment and the corresponding provision of the Pennsylvania Constitution, Article I, § 8. On appeal to the Court of Common Pleas, the order of suppression was affirmed as to evidence resulting from the search of Petitioner's home, but reversed as to evidence from a search at another location. Opinion, A.35.

Following remand of the case to the Municipal Court, Petitioner was acquitted.

Petitioner sought the return of his firearms collection. The prosecutor, an Assistant District Attorney who had personally participated in the warrantless search, initially stated in writing to Petitioner's counsel that the Commonwealth had "no objections to returning all the weapons taken from the Fassnacht residence with the exception of any that might be classified as contraband. It is my recollection that there were one or two automatic weapons in that lot; . . . . I gather that you are not requesting the return of the automatic weapons [seized at another location]. You are not asking for explosives." Subsequently, the prosecutor conditioned his return of the material confiscated (again excepting some "contraband" items such as automatic weapons), upon Petitioner's

agreement "that there will be no further action" by Petitioner.

Petitioner declined to agree to a general release of his damage claims arising from the search and accordingly was required to file a petition in an effort to obtain his property. The prosecutor opposed the petition initially on two grounds only, i.e., (1) Petitioner had not proved that the weapons seized "are in fact Petitioner's property" and (2) Petitioner had not proved that "the property, it if [sic] does belong to him, may be legally processed [sic] by him."

The Miscellaneous Judge of the Court of Common Pleas, who had not heard any of the earlier proceedings in the case, declined to have a formal hearing on the petition. There instead occurred a conference in chambers attended only by counsel, Petitioner himself being excluded, during which conference the pro-

secutor made offers of proof of the testimony to be offered in opposition to the petition. Petitioner's counsel objected to all evidence except evidence concerning the current status as contraband per se of any of the weapons. Transcript [of Conference] ("Tr.") at 3-5. The prosecutor contended that automatic weapons which had been seized were "contraband per se" (Tr. 26-27). The prosecutor stated that "there are a large number of regular rifles which are not automatic pistols or adaptable [as automatic weapons]"; such "regular pistols," although not registered, were "in the basement," and hence did not require registration (Tr. 27); none of these rifles or regular pistols were contended by the prosecutor to be contraband per se. The prosecutor also conceded that small arms ammunition "can be owned by anyone. It does not have to be licensed" (Tr. 16).

As to the rifles, pistols, and small arms ammunition, constituting the bulk of the property seized, the prosecutor urged that the property should be confiscated on the theory that "Mr. Fassnacht was a dealer, an unlicensed dealer; that he stored these items in his basement without proper license, and therefore they are forfeitable" (Tr. 16).

The prosecutor's offer of proof to establish that Petitioner was a "dealer, an unlicensed dealer" included photographs of Petitioner's basement which had been made during the search. The same photographs had been earlier marked for identification in Petitioner's trial and were among the evidence which had been suppressed. The prosecutor also offered the testimony of a Treasury Department officer, Frank A. Moyer, concerning Moyer's observation of the basement and the property seized in the

basement, and not on any knowledge of Petitioner's actual conduct. Moyer had testified previously and his testimony was among the evidence suppressed. The prosecutor offered Moyer's opinion that the quantity of weapons and ammunition was "indicative to him of a dealer in firearms and ammunition and not a collector" (Tr. 39) and Moyer's opinion "that the storage of the weapons, although neat and clean was also indicative of a dealer rather than a collector since a collector would not keep them in boxes down in the basement" (Tr. 39); "the manner of storage of the weapons themselves were not indicative of a collector. Moyer would indicate that they were all well kept, clean, oiled, et cetera, was that a collector would not reuse this quantity of items in the basement in boxes for a period of several years" (Tr. 33) (emphasis added).

Petitioner's counsel, after repeatedly objecting to admission of these offers (Tr. 4-5, 8-9, 14, 20, 40-41) agreed that Moyer would so testify (Tr. 44) and offered in rebuttal to produce Petitioner's testimony concerning his occupation as a ballistics expert, that "it is necessary in his role as a private ballistics expert to have on hand a collection," that Petitioner was also a private collector, and that Petitioner would testify that "he never engaged in transactions, wholesale or retail, with these items" (Tr. 46). Both sides agreed that Petitioner had attempted to register those automatic weapons which were required to be registered under the 1968 Act (Tr. 34-37, 47-48). It was stipulated that Petitioner was not then licensed

under the Act (Tr. 12, as of July 1974)* and stipulated also that Petitioner's license under the prior Federal statute had expired in 1969, after he left the United States (Tr. 12-13).

The prosecutor's contention that Petitioner had been an "unlicensed dealer" related to a time period in which Petitioner was outside the United States and far removed from the rifles, pistols and ammunition contended to be his stock in trade (Tr. 12-13).

Petitioner's counsel offered to present testimony of another ballistics expert to "rebut the

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* At the time of the subsequent argument in the Pennsylvania Superior Court, and presently, Petitioner holds a federal firearms license pursuant to U.S. Treasury Department ATF Ruling 73-19, 1973 Alcohol, Tobacco & Firearms Cum. Bull. 93 which provides that experts and consultants be licensed under the Gun Control Act of 1968 in category one, which is also the category for a "dealer in firearms."

[prosecutor's] inference concerning the dealership," including that expert's opinion that the quantity of items was "consistent with a private collection from his opinion and his experience" (Tr. 48).

The Miscellaneous Judge held that:

> "This Court agrees with the Commonwealth's averment that 'The nature, quantity and method of storage of the items that are contraband by statute and certain other items (the non-automatic rifles and pistols, ammunition, gun parts and magazines) establish that petitioner was an unlicensed dealer in firearms and ammunition, in violation of both Pennsylvania and federal laws covering both the licensing of the dealers and the storage of the items to be sold, and thus those items are contraband' and therefore not subject to be returned." Common Pleas Opinion A. 30.

On appeal to the Pennsylvania Superior Court, Petitioner again urged

the return of those items which were not subject to any statutory prohibition (principally rifles, pistols, and ammunition), and which accordingly could not be deemed to be contraband per se. Petitioner disclaimed seeking immediate possession of the automatic weapons, which had not yet been registered under the 1968 Act, pending disposition of a declaratory judgment action he had commenced in the United States District Court, Fassnacht v. Simon, Civil Action No. 74-2125 (E. D. Pa.), to require the U.S. Treasury Department to accept registration as of 1968 pursuant to the amnesty provisions of that Act.

Petitioner contended that the return of all property not contraband per se was required by this Court's decision in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)

(Brief for Appellant 4) that "the Fourth Amendment prohibits not only unreasonable searches but also unreasonable seizures" (Brief 6), and that "the forfeiture of the property in question constitutes an unlawful taking by the Commonwealth and a deprivation of property without due process" (Brief 4, 10).

Conceding that no statute prohibited possession in Petitioner's home of non-automatic rifles, pistols, and ammunition, the prosecutor argued in support of the Miscellaneous Judge's order of forfeiture of those items on the ground that everything seized during the search, "including the non-automatic pistols and rifles, ammunition, weapon parts, magazines and clips which appellant claims are returnable to him, are contraband since they represent the unsold inventory of [Petitioner's] unlicensed dealership

in arms, ammunition and explosives" (Brief for Appellee 19). The Prosecutor stated that "Admittedly, no direct evidence was presented to the Court below that [Petitioner] was involved in either retail or wholesale transactions with respect to the items that were seized from his home" (Brief 21), but contended that the circumstantial and opinion evidence sustained the finding that Petitioner was an unlicensed dealer. In addition to the opinions of Moyer, such as the opinion of Moyer that "the manner in which the weapons were stored in the basement was not the manner in which a collector would display his collection" (Brief 6), the prosecutor argued (without reference to any expert opinion) that some of the rifles appeared to the prosecutor on the

basis of the prosecutor's inventory to be duplicates of others owned by Petitioner, so that it appeared to the prosecutor that Petitioner "in several instances possessed more than one gun of the same model" (Brief 24), and that by analogy to cases involving persons discovered in possession of "massive quantities of heroin, glassine bags and other paraphernalia" the quantity nature and matter of storage of the items "found in [Petitioner's] basement indicates that Petitioner did not possess said items for his personal use, but rather possessed them for future transfer either by sale or other distribution" (Brief 22). (Emphasis added.)

The Superior Court heard oral argument and filed its decision twenty months later. The first part of the opinion accepts Petitioner's

contentions that the Fourth Amendment, as construed in Plymouth Sedan, 380 U.S. 693, required the return of all the property which was not contraband per se, holding that the "lower court's order that the property be forfeited and destroyed was proper only if the property was contraband per se, so that [Petitioner's] repossession of it would subject him to criminal penalties." Superior Court Opinion A. 7, 369 A. 2d at 803.

The second part of the Superior Court opinion considers separately three general descriptions of property. As to the items not prohibited by any statute (rifles, pistols, ammunition, and accessories), the Superior Court held that the lower court was "justified in finding by a preponderance of the evidence that [Petitioner] had engaged in unlicensed

dealing in violation of the Federal Gun Control Act" of 1968, 18 U.S.C. § 922(a)(1); the Superior Court explicitly did not reach or consider any other of the "string of statutes" referred to by the lower court. Opinion A. 11, 369 A.2d at 804. Apparently believing that the lower court had received testimony on the dealership issue, the Superior Court stated that Petitioner's contentions concerning his reference collection as a forensic ballistics expert had been "rebutted by the Commonwealth's expert testimony that the type of weapons and their duplication and manner of storage (export quality packaging) were not consistent with a 'reference collection' but rather indicated dealing." Opinion A. 12-13, 368 A.2d at 805.

As to the second broad category consisting of two types of gunpowder,

the Superior Court held one type to be contraband per se as an "explosive" within the meaning of a statute and a City ordinance. As to another type of gunpowder, conceded by the prosecutor to be "non-explosive," the Superior Court affirmed the lower court's holding that Petitioner's rights were controlled by the special and local three-month period of limitations on actions commenced "against the Philadelphia association for the relief of disabled firemen" to redress a wrongful seizure of gunpowder under the 1856 statute, 53 Pa. Stat. § 16568, rather than by the procedure under the modern Pennsylvania Rules of Criminal Procedure 324(b); Petitioner had earlier been charged with a criminal offense under that same 1856 statute, notwithstanding that the only procedure to penalize violations, as stated in the statute, is "an action

of debt . . . to and for the use of" the same association. Opinion A. 14-16, 369 A.2d at 805.

As to a third category of property, principally military swords, the Superior Court remanded for additional findings, noting that the statute relied on by the prosecution had not been enacted until after the seizure. Opinion A. 16-17, 369 A.2d at 805-06.

Petitioner applied successively for rehearing in the Superior Court, for review by the Supreme Court of Pennsylvania, and for reconsideration of that Court's denial of review, all of which applications were denied without opinion. The instant petition followed, seeking review both of the Superior Court's disposition of Petitioner's Constitutional claims and of the Superior Court's novel construction of "unlicensed dealing" within the

meaning of the Gun Control Act of 1968.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with this Court's construction of the Fourth Amendment in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), because the Pennsylvania Superior Court affirmed forfeiture of Petitioner's non-automatic rifles, pistols and ammunition, items innocent in themselves under both federal and state law, on the basis of evidence previously suppressed in the same proceeding and notwithstanding that the Superior Court recognized that the factual circumstances required return of all property not contraband per se.

The decision below is in conflict with the due process clause of the Fourteenth Amendment, as construed in Thompson v. Louisville, 362 U.S. 199 (1960), because Petitioner's

property was ordered forfeited without any evidence to establish the facts concerning the alleged "unlicensed dealership," even if the evidence obtained in violation of the Fourth Amendment is considered; the Superior Court's decision affirming the forfeiture has the effect of creating a presumption that mere possession of property is evidence of an intent to distribute that property, in conflict with this Court's decisions in Turner v. United States, 396 U.S. 398, 421 (1970), and Tot v. United States, 319 U.S. 463 (1943).

The decision below adopts a construction of a frequently litigated portion of the Gun Control Act of 1968, 82 Stat. 1214, 18 U.S.C. §§ 921 et seq., which is in conflict with the reasoning of all decisions of the Courts of Appeals on the quantum of

evidence necessary to establish that an individual is an unlicensed dealer, e.g., United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975) cert. denied, 424 U.S. 918 (1976); United States v. Gross, 451 F.2d 1355 (7th Cir. 1971), and is contrary to the Congressional intent that gun collecting is not proscribed by the Act. Huddleston v. United States, 415 U.S. 814, 828 n.9 (1974).

A. Petitioner's Fourth Amendment rights were violated by the forfeiture of property innocent in itself on the basis of evidence previously suppressed.

Since 1886, evidence obtained in violation of the Fourth Amendment may not be used in a federal proceeding to sustain a forfeiture. Boyd v. United States, 116 U.S. 616 (1886). That constitutional exclusionary rule has been applicable since 1965 to state forfeiture proceedings. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

Both the reasoning of this Court in Plymouth Sedan and the application in other cases of the exclusionary rule declared in Plymouth Sedan depend heavily on the distinction between contraband per se and derivative contraband.

Contraband per se constitutes "objects the possession of which, without more, constitutes a crime." 380 U.S. at 699, such as narcotics, United States v. Jeffers, 342 U.S. 48, 54 (1951) or an unregistered still. Trupiano v. United States, 334 U.S. 699, 710 (1948). The Fourth Amendment exclusionary rule of Plymouth Sedan does not apply to protect a claimant who seeks the return of contraband per se, because if the object subject to forfeiture is one of those "objects the possession of which, without more, constitutes a crime," the Government which has illegally seized the object is not required to return it, not only

because "repossession of such per se contraband" would subject the possessor to "criminal penalties," Plymouth Sedan, 380 U.S. at 699, but also because the "return of the contraband would clearly have frustrated the express public policy against the possession of such objects." 380 U.S. at 699.

Derivative contraband is property which is innocent by itself, but subject to forfeiture because the property has been illegally used. 380 U.S. at 699-700. Plymouth Sedan holds that the Fourth Amendment exclusionary rule is applicable to cases involving derivative contraband. 380 U.S. at 699-700.

Although the exact extent of the exclusionary rule has been subject to case-by-case development, United States v. Janis, 428 U.S. 433, 434 (1976), the Court in Janis did not

change the long-settled rule that a forfeiture proceeding is "quasi-criminal," citing Boyd, 116 U.S. at 634, and "clearly a penalty for the criminal offense," citing Plymouth Sedan, 380 U.S. at 701 and quoting from that decision the conclusion that it "would be anomalous indeed . . . to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." United States v. Janis, 428 U.S. at 447 n.17, quoting from 380 U.S. at 701.

The distinction between contraband per se and derivative contraband is crucial to the correct application of the Fourth Amendment to many forfeiture proceedings, including the instant proceeding.

The Pennsylvania Superior Court in the instant case recognized the controlling importance, when Fourth Amendment claims have been raised, of distinguishing contraband per se from derivative contraband; half its opinion is directed to an analysis of the distinction. A. 3-7; 369 A.2d at 802-03. The opinion correctly paraphrases from Plymouth Sedan the definition of contraband per se as "property the mere possession of which is unlawful," and the definition of derivative contraband as "property innocent by itself, but used in the perpetration of an unlawful act." A. 369 A.2d at 802.

The opinion next concluded that the Fourth Amendment would require in the instant case, as in Plymouth Sedan, that if "the property in question was derivative contraband, the exclusionary rule . . . was applicable in a proceeding

to forfeit the property," and the application of the exclusionary rule to the instant case, accepting as binding the unappealed finding that the seizure was in violation of the Fourth Amendment, required the return of property. "[I]f the property was derivative contraband, the [trial] court should have granted [Petitioner's] petition for the return of his property." A. 7 , 269 A.2d at 803. Stated conversely:

> "the [Common Pleas] court's order that the property be forfeited and destroyed was proper only if the property was contraband per se, so that [Petitioner's] repossession of it would subject him to criminal penalties." A. 7 , 369 A.2d at 803.

Having thus carefully analyzed the difference between contraband per se and derivative contraband, and having stated the result which was required if the property seized at Petitioner's home were determined to be only

derivative contraband, the Superior Court misconceived the nature of the property which was at issue in the appeal to that court.

As Petitioner's appeal was presented to the Superior Court, the firearms sought to be returned were firearms "innocent in themselves" and not subject to being deemed contraband per se. As to these descriptions, e.g., rifles, pistols, and ammunition, there was in 1971, and is now, no statute requiring registration or limiting possession of those items if possessed in Petitioner's home. Indeed, during the suppression hearing in the Municipal Court, the federal and City of Philadelphia officers constituting the raiding party could not explain why they had seized the rifles, pistols and ammunition. As the Municipal Court summarized the testimony:

> "No one, including Captain Martin [in charge of the seizure] could explain why the police seized and removed rifles, pistol[s] and ammunition other than that Deputy Police Commissioner Soloman ordered them to do so." Municipal Court Opinion on Motion to Suppress 13.

Since no contention was made at the time of seizure or during the forfeiture proceedings that rifles, pistols, and ammunition constituted "property the mere possession of which is unlawful," the definition stated in Plymouth Sedan as the definition of "contraband per se," the Superior Court should have ordered the return of those items pursuant to the Fourth Amendment as construed in Plymouth Sedan. That result was required by the Superior Court's own conclusion that Plymouth Sedan required that Petitioner's property be returned "if the property was derivative contraband . . . .", and that the Common Pleas

Court's order "was proper only if the property was contraband per se, so that appellant's repossession of it would subject him to criminal penalties." A. 7 , 369 A.2d at 803.

Moreover, the underlying failure correctly to apply the distinction between contraband per se and merely derivative contraband led the Superior Court to approve other violations of Petitioner's Fourth Amendment rights, of which the most striking violation is the approval by the Superior Court of the prosecution's use in the forfeiture stage of the instant case of exactly the evidence that had previously been suppressed. The clearest example is the use at the forfeiture stage of the same photographs of Petitioner's basement which had been suppressed during the trial

stage. The same analysis is applicable to Moyer's expert opinion "indicating" Petitioner was a dealer, since that opinion was based solely upon Moyer's observations of Petitioner's basement, while the seizure was being effected, and his observations of the weapons themselves. Moyer's observation of the "nature, quality and method of storage" of the rifles, pistols and ammunition, all innocent in themselves, to support his opinion "indicating" an unlicensed dealership, is identical, for purposes of the Fourth Amendment, with Pennsylvania's previous effort in Plymouth Sedan to use in the forfeiture stage of that case the evidence, previously suppressed, that the officers who searched the sedan had discovered 31 cases of untaxed liquor in the rear and trunk. As this

Court held in Plymouth Sedan:

> "In both the Boyd situation and here the essential question is whether evidence--in Boyd the books and records, here the results of the search of the car--the obtaining of which violates the Fourth Amendment may be relied upon to sustain a forfeiture." 380 U.S. at 698.

The Superior Court in the instant case seems to have adopted for Pennsylvania a rule that such evidence may be used to sustain a forfeiture if the property at issue is rifles, pistols and ammunition. That holding is in conflict with Plymouth Sedan.

B. Petitioner's Fourteenth Amendment rights under the due process clause were violated by the forfeiture of property without any evidence whatsoever to support the conclusion that Petitioner was an unlicensed dealer as defined in the Gun Control Act.

Separately and independently from the violation of Petitioner's Fourth

Amendment rights, the Superior Court's affirmance of the findings below would constitute a denial of Petitioner's rights to procedural due process under the Fourteenth Amendment, even if Moyer's testimony were received (in the form predicted by the offers of the prosecutor) and considered, because there is nothing in Moyer's observations and opinions which supports the conclusion that Petitioner had "engaged in the business of selling firearms or ammunition at wholesale or retail," the statutory definition of a "dealer" for purposes of the Gun Control Act of 1968, supra, at 6, 18 U.S.C. §921(a)(11). Petitioner's alleged "unlicensed dealing" in violation of 18 U.S.C. §922(a)(1) was the sole ground adopted by the Superior Court to sustain the forfeiture of the rifles, pistols, ammunition, and accessories. Opinion A. 11, 369 A.2d at 804.

Moyer's observation that Petitioner owned a large quantity of rifles, pistols, and ammunition no more establishes that Petitioner is an unlicensed dealer in such items than would an observation that a person owns a large quantity of stamps, or a large quantity of bottles of wine, or a large quantity of oil paintings, establish that such a person is a dealer in those items. The same reasoning which led the state courts in the instant case to determine that Petitioner was an unlicensed dealer in firearms would establish that a person with a substantial wine-cellar is an unlicensed dealer in wine; the presumption would be strengthened, in the prosecutor's view, if the owner of the wine-cellar was absent from the United States for two years and unable to drink any of

his collection. (Compare the prosecutor's Brief in the Superior Court at 23, asserting that Petitioner's two and a half year absence prior to the seizure is evidence that he was a dealer during that period as to the property in his basement.) Similarly, a collector who carefully prepared his paintings for storage during a long absence would, in the prosecutor's view, be presumed to be a dealer because of the quality of the packing materials and the fact that his paintings were not on display during his absence (Compare the prosecutor's offer covering testimony by Moyer at Tr. 33).

Since the prosecutor stipulated that Petitioner was licensed under the prior Federal Act until mid-1969 (Tr. 12-13) and also conceded that Petitioner had been absent from the United States

for two and one-half years prior to the seizure on June 20, 1971 (Brief for Appellee 23) the prosecutor's "unlicensed dealership" could have existed only while Petitioner was outside the United States, away from the weapons in his basement which have now been forfeited on the theory that they were his stock in trade.

Not only was "no direct evidence" presented "that [Petitioner] was involved in either retail or wholesale transactions with respect to the items that were seized from his home," as the prosecutor conceded (Brief 21), but also there was no indirect or circumstantial evidence of such transactions. Moreover, one of the elements relied upon by the Superior Court to establish the dealership is totally unsupported in the

record, lacking the support even of an offer of Moyer's speculative opinion. The Superior Court noted that Petitioner's contention that his property was a reference collection "was rebutted by the Commonwealth's expert testimony that the type of weapons and their duplication and manner of storage (export quality packaging) were not consistent with a 'reference collection' but rather indicated dealing." (Emphasis added.) A. 12-13, 369 A.2d at 805. In fact, no offer was made of any expert testimony which would have established that there were any duplicates in the collection. The contention concerning duplicates appears solely in the prosecutor's brief in the Superior Court at page 24, and is based solely upon counsel's reading of the Police inventory; if this contention had been

made previously, Petitioner would have explained the details which cause each alleged "duplicate" to be different from others of the same general description.

For example, the six "7mm caliber Mauser rifles" urged by the prosecutor to be "duplicates" on which a true collector, in the prosecutor's view "would not have wasted the money or valuable storage space" (Brief 24) are not duplicates at all. Petitioner's recollection is that his collection contained six such rifles, including a Belgian FN 1949 semi-automatic model, four bolt action models from different years and different countries: a Spanish 1893 carbine, a German 1888 carbine, a Nicaraguan 1898 rifle, and a Chilean 1898 rifle; and another FN 1949 model modified for Egypt with

Egyptian sights.

The instant case is substantially similar to both Thompson v. Louisville, 362 U.S. 199 (1960), and to the line of presumption cases which includes Tot v. United States, 319 U.S. 463 (1943), and Turner v. United States, 396 U.S. 398 (1970).

As in Thompson, no evidence was presented to prove that Petitioner had engaged in the conduct prohibited by the statute, i.e., evidence that Petitioner had "engaged in the business of selling firearms or ammunition at wholesale or retail...." 18 U.S.C. §921(a)(11). Instead, the Superior Court in the instant case approved a presumption of dealership which proceeds from the evidence of possession of a quantity of firearms, without any evidence that Petitioner ever engaged

in the business of selling those firearms. Such reasoning has been held by this Court to violate due process of law even when supported by express Congressional findings. Even as to possession of heroin, if the fact to be established is dispensing or distributing, "the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts." Turner v. United States, 396 U.S. at 421. Nor is the Superior Court's reasoning in the instant case any less "arbitrary" than the statutory presumptions under the prior Federal Firearms Act, 52 Stat. 1250, which were held unconstitutional in Tot v. United States, 319 U.S. at 467-68.

An additional reason for the application of the rule of Thompson v. Louisville to the instant case is that the Common Pleas Court in fact received

no evidence, except for the photographs of the basement and a few stipulations between counsel. The "Commonwealth's expert testimony" relied on by the Superior Court A. 12 , 369 A.2d at 805, was nothing but an offer of proof of what Moyer would say, and was contradicted by the opposing offers of Petitioner's expert and Petitioner's own testimony to deny any transactions (Tr. 46-49). Although the informal procedure of cross-offers of proof, as used by the Common Pleas Court, might be useful and proper in some circumstances, it accomplished a denial of due process of law in the instant case. The Common Pleas Court received, over objection by Petitioner's counsel, an offer of speculative expert testimony from the prosecution, which was met by Petitioner's own offer of his own direct testimony

on the controlling factual issue (i.e., whether Petitioner engaged in any transactions) as well as by an offer of expert testimony to rebutt the prosecution's offer.

Without hearing any of the witnesses, the Common Pleas Court resolved the issue of unlicensed dealership in favor of the prosecution. That procedure provides no more sound a basis for the forfeiture of Petitioner's property than did the unjustified conclusions drawn from the actual testimony in Thompson v. Louisville. The Thompson case was reversed because it is "a violation of due process to convict and punish a man without evidence of his guilt." 362 U.S. at 206. It is equally a violation of due process to forfeit a man's property solely on the basis of an alleged violation of the Gun Control Act, without any

evidence that Petitioner, during the two and one-half years prior to June 20, 1971, or at any other time, ever engaged in any transactions, wholesale or retail, or "engaged in the business of selling firearms or ammunition at wholesale or retail," the definition set forth in the Act. 18 U.S.C. §921(a)(11).

C. The construction of the Gun Control Act adopted by the court below is contrary to the Act and in conflict with all Courts of Appeals decisions on the evidence required to establish unlicensed dealing.

The Superior Court's holding that a violation of the dealership provision of the Gun Control Act, 18 U.S.C. § 922(a)(1), could be established without any evidence of transactions in firearms or of Petitioner having otherwise "engaged

in the business of selling firearms or ammunition at wholesale or retail," the definition of "dealing" stated in, 18 U.S.C. § 921(a)(11), has resulted in a construction of the Act which is contrary not only to the text but also to the intention of Congress as revealed in the legislative history of the Act.

The conclusion of the Superior Court that possession of a quantity of rifles, pistols, and ammunition is sufficient to establish a violation of the Act, without evidence of transactions, appears to be contrary to the reasoning of every Court of Appeals decision interpreting this part of the Act.

The prior decisions construing 18 U.S.C. § 922(a)(1) and the definition contained in the preceding section, 18 U.S.C. § 921(a)(11), are not consistent

among the Circuits. See Annotation, "What Constitutes Unlawful 'Dealing in Firearms or Ammunition' under 18 U.S.C.S. § 922(a)(1), 32 A.L.R. Fed. 946 (1977)." Some decisions have held that "business" as used in the Act "is commonly understood to mean an activity engaging some of one's time, attention and effort and performed in expectation of profit or other benefits . . . ." United States v. King, 532 F.2d 505, 510 (5th Cir.) cert. denied, 429 U.S. 960 (1976). Another case which adopts the "livelihood or profit" criteria is United States v. Gross, 451 F.2d 1355, 1357 (7th Cir. 1971), holding that

> "There appears to be little doubt that 'dealer' means anyone who is engaged in any business of selling firearms, and that 'business' is that which occupies time, attention and labor for the purpose of livelihood or profit." (Emphasis by the court.)

United States v. Day, 476 F.2d 562, 567 (6th Cir. 1973), approves an instruction taken from the above-quoted language of Gross.

Other cases, including United States v. Swinton, 521 F.2d 1255, 1258-59 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1976), have rejected the contention that the "Government must establish a profit as part of its case-in-chief."

But until the decision of the Superior Court in the instant case, no court, to the best knowledge of counsel, has held that a violation of 18 U.S.C. § 922(a)(1) can be established without evidence of at least one transaction. In Swinton, the Tenth Circuit expressly held that a single transaction between the defendant and a Treasury agent

> "standing alone, without more, would not have been sufficient to establish a

> violation of § 922(a)(1). That sale, however, when considered in conjunction with other facts and circumstances related herein, established that Swinton was engaged in the business of dealing in firearms . . . . The unrebutted evidence of the Government established not only that Swinton considered himself to be and held himself out as a dealer, but that, most importantly, he was actively engaged in the business of dealing in guns." 521 F.2d at 1259.

The Government has taken the same position during prosecutions under the Act. The decision in United States v. Jackson, 352 F.Supp. 672 (S.D. Ohio 1972) aff'd , 480 F.2d 927 (1973), quotes with approval the Government's interpretation, as stated in its brief:

> "Congress did not intend to place unnecessary restrictions on law-abiding citizens who may wish to dispose of a firearm in the state of his residence. Accordingly, an isolated sale in his home state would not place a citizen in the business of dealing in firearms, in

> the absence of other characteristics indicative of such business." 352 F.Supp. at 677.

The holding in the instant case is unique in finding a violation of Section 922(a)(1), albeit by a supposed "preponderance of the evidence", A. 12, 369 A.2d at 804, in the absence of any evidence of even a single transaction and in the face of Petitioner's uncontradicted offer of proof that no transactions occurred (Tr. 46-47). The effect of the Superior Court's decision is to interfere with the activities of "law-abiding citizens", including persons who engage in "gun collecting," an activity intended by Congress to be distinguished from those activities subjected to regulation. See Huddleston v. United States, 415 U.S. 814, 828 n.9.

Review of the instant decision is required in order to

define the nature of the evidence which is required to establish a violation of the Act, and avoid the creation in the future of a line of cases, based on the decision below, in which mere possession of a quantity of firearms is held to be sufficient to support a forfeiture or a conviction.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted to review that portion of the judgment of the Superior Court which affirmed the forfeiture of Petitioner's rifles, pistols, ammunition and accessories.

Respectfully submitted,

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Of Counsel:

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August 2, 1978

IN THE SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	OCTOBER TERM, 1975
V.	:	
GEORGE FASSNACHT	:	NO. 705

Argued June 16, 1975.
Decided February 18, 1977.

O P I N I O N

SPAETH, Judge:

On June 20, 1971, officers of the Philadelphia Police Department searched appellant's home in Northeast Philadelphia, and found stored in the basement an arsenal of weapons and explosives, ranging from several hundred automatic machine guns, rifles, and pistols to military knives and swords, and a machete. This property was seized by the police, and appellant was arrested and charged with several criminal offenses relating to possession and dealing in weapons and explosives. However, because

the weapons and explosives had been seized in violation of the Fourth Amendment, appellant's motion to suppress their use as evidence was granted, with the result that appellant was found not guilty.

On April 19, 1974, appellant filed a petition for the return of his property. By order of June 5, 1975, the lower court denied the petition, and ordered the property forfeited and destroyed. This appeal is from that order. Pending disposition of the appeal, a supersedeas was granted to stay the destruction of the property. We now dissolve the supersedeas, affirm the order of the lower court in part, and reverse in part.

A petition for the return of property is authorized by Pa.R.Cr.P. 324, which permits the return of property seized with or without a warrant "unless the court determines that such property is contraband, in which case the court may order the property to be forfeited." Pa.R.Cr.P. 324(b).

Here the lower court determined that the property was contraband.

The law of contraband is ancient[1] but evolving. Originally a forfeiture proceeding was considered a purely in rem civil action against the property. Courts have come to recognize, however, that in substance the proceeding may be more criminal than civil, and consequently they will afford the owner some of the procedural safeguards normally relevant only to criminal actions.[2] One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965).

In this evolution, two distinct

1. See generally, The Goring Ox: Some Historical Perspectives on Deordands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 Temp.L.Q. 169 (1973).
2. For discussion of the historical background and procedural evolution of the law of contraband, see Commonwealth v. Landy, 240 Pa.Super. 458, 362 A.2d 999 (1976).

classifications of contraband have been developed: contraband per se, and derivative contraband. Contraband per se is property the mere possession of which is unlawful. One 1958 Plymouth Sedan, supra; United States v. One Lot of Eighteen Firearms, 325 F.Supp. 1326 (D.N.H. 1971). Heroin and "moonshine" whiskey are examples of contraband per se. Derivative contraband is property innocent by itself, but used in the perpetration of an unlawful act. An example of derivative contraband is a truck used to transport illicit goods. Most jurisdictions have procedures by which derivative contraband may be forfeited.[3]

However, in a forfeiture proceeding, derivative contraband will be treated differently from contraband per se. In One 1958 Plymouth Sedan, supra, the Commonwealth of

3. Compare, 49 U.S.C. §782; 35 P.S. §780-128 (a)(4); 47 P.S. §6-601 et seq.; 72 P.S. §3169.1001 (1976 Supp.).

Pennsylvania sought the forfeiture of an automobile used to transport untaxed liquor. It appeared that officers of the Pennsylvania Liquor Control Board had searched the automobile and seized the liquor without probable cause. The hearing judge denied the forfeiture petition on the ground that forfeiture of the automobile depended upon the admission of evidence seized in violation of the Fourth Amendment as applied to the States by the Fourteenth Amendment. This court reversed, and directed that the automobile be forfeited, 199 Pa. Superior Ct. 428, 186 A.2d 52 (1962) and on further appeal, the Supreme Court affirmed our order, 414 Pa. 540, 201 A.2d 427 (1964). The United States Supreme Court granted certiorari, and reversed, holding that when the property in question was derivative contraband, the exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), was applicable in a proceeding to forfeit the

property. The Court recognized that in United States v. Jeffers, 342 U.S. 48 (1951), and Trupiano v. United States, 334 U.S. 699 (1948), it had been said in dictum that the fact that contraband was inadmissible in a criminal prosecution, because seized in violation of the Fourth Amendment, did not mean that the government was obliged to return it. In those cases, however, the contraband was contraband per se - in Jeffers, illegally imported narcotics, and in Trupiano, a still, alcohol, and mash. The Court explained that

> repossession of such per se contraband by Jeffers and Trupiano would have subjected them to criminal penalties. The return of the contraband would clearly have frustrated the express public policy against the possession of such objects.

Id. at 699.

In the present case, as has been mentioned, it appears that in the criminal prosecutions against appellant, appellant's motion to suppress the property seized in his

home was granted on the ground that the property had been seized in violation of the Fourth Amendment. Consequently, if the property was derivative contraband, the lower court should have granted appellant's petition for the return of his property. One 1958 Plymouth Sedan, supra. The lower court's order that the property be forfeited and destroyed was proper only if the property was contraband per se, so that appellant's repossession of it would subject him to criminal penalties. One 1958 Plymouth Sedan, supra; United States v. Jeffers, supra; Trupiano v. United States, supra.

To determine whether property is contraband, and if so, what type of contraband, one must refer to the nature of the property and to the statute or statutes that it is contended make possession of the property or its use unlawful. Commonwealth v. Landy, 240 Pa.Super. 458, 362 A.2d 999 (1976).

Several different methods of describing the property seized in appellant's home have been used by the parties. For purposes of our discussion, we shall adopt the classifications suggested by appellant in his brief to this court. Brief of Appellant at 3-4. These classifications are as follows:

1. Automatic weapons, machine guns, and automatic pistols;
2. Six pistols with shoulderstocks;
3. One silencer for a pistol;
4. Pistols;
5. Rifles;
6. Knives, swords, and a machete;
7. Ammunition;
8. Weapon parts, including parts for machine guns and automatic pistols, as well as parts for regular rifles and pistols;
9. Ammunition magazines and ammunition clips for both automatic and regular weapons;
10. Items that the Commonwealth has agreed to return; [4]

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4. Appellant includes this classification of items in his appeal although there was no finding by the lower court that these items are contraband. Appellant, however, "would remind [this court] that even

11. A propelling charge and a grenade simulator;
12. Containers of sporting gun powder, which powder is smokeless and non-explosive;
13. Containers of black sporting powder;
14. Destructive devices or explosives, plastic explosives, electric squibs, TNT and hand grenade fuses;
15. Pyrotechnics and fireworks.

Except for the items in Classification 10, [5] the lower court found all of the property to be contraband. On this appeal, appellant challenge that finding only with respect to some of the classifications. He does not appeal as to the following

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continued
though it has agreed to retain [sic - return?] these items, the Commonwealth has not yet done so." Brief of Appellant at 17. If appellant has a complaint that the Commonwealth has breached some agreement, his recourse in the first instance is not to this court.

5. See footnote 4, supra.

classifications: (1) automatic weapons, machine guns, and automatic pistols; (2) six pistols and shoulderstocks; (3) one silencer for a pistol; (11) a propelling charge and a grenade simulator; (14) destructive devices or explosives, plastic explosives, electric squibs, TNT and hand grenade fuses; and (15) pyrotechnics and fireworks. Accordingly, we need only review the lower court's finding of contraband as to these classifications: (4) pistols; (5) rifles; (6) knives, swords, and a machete; (7) ammunition; (8) weapon parts, including parts for machine guns and automatic pistols, as well as parts for regular rifles and pistols; (9) ammunition magazines and ammunition clips for both automatic and regular weapons; (12) containers of sporting gun powder, which powder is smokeless and non-explosive; and (13) containers of black sporting powder.

Classifications 4, 5, 7, 8 and 9.

The pistols, rifles, ammunition, weapon parts, and ammunition magazines and clips may be dealt with together. The lower court cited a string of statutes that prohibit appellant's possession or use of these items.[6] However, we need look no further than the Federal Gun Control Act of 1968, 18 U.S.C. §921 et seq.

The Gun Control Act prohibits unlicensed dealing in firearms and ammunition. §922(a)(1). The question before the lower court, therefore, was whether appellant had engaged in such dealing. Since this is a forfeiture proceeding, proof of the elements

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6. 26 U.S.C. §5861; 26 I.R.C. §178 et seq.; 18 U.S.C. §921 et seq.; 18 U.S.C. §841 et seq.; 18 Pa. C.S. §6112 et seq.; 35 P.S. §1271 et seq.; Philadelphia City Ordinances §5-1001 et seq., and §10-814 et seq.

of unlicensed dealing was not requied beyond a reasonable doubt, but only by a preponderance of the evidence. Commonwealth v. Landy, supra.; Commonwealth v. One 1927 Graham Truck, 165 Pa. Superior Ct. 1, 67 A.2d 655 (1949); Commonwealth v. 3 Halves of Beer, 162 Pa. Superior Ct. 191, 56 A.2d 333 (1948).

Applying this standard, the lower court found that appellant had engaged in unlicensed dealing. The court particularly relied on the evidence of the "nature, quality and method of storage" of the items and ammunition. Appellant contended that the items were only a "reference collection" for his use as a "forensic ballistics expert". This contention was rebutted by the Commonwealth's expert testimony that the type of weapons and their duplication and manner of storage (export quality packaging) were not consistent with a "reference collection"

but rather indicated dealing. The Commonwealth also introduced evidence that the files of the appropriate federal agencies disclosed no dealer's license for appellant.

On this record we have no difficulty in concluding that the lower court was justified in finding by a preponderance of the evidence that appellant had engaged in unlicensed dealing in violation of the Gun Control Act. It follows that the pistols, rifles, weapons parts, and ammunition magazines and clips were contraband per se, and therefore could be forfeited; appellant's repossession of them would enable him to resume dealing in them and hence "would clearly . . . frustrate [] the express public policy against the possession of such objects." One 1958 Plymouth Sedan, supra at 699.[7]

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7. The Gun Control Act itself provides for forfeiture of these items. 18 U.S.C. §924(d).

It may be added in this regard that the lower court did not err in including the weapons parts as contraband, for the Gun Control Act includes those in its prohibition. 18 U.S.C. §921(a)(3)(B). The same may be said of the court's inclusion of the ammunition magazines and clips, which are within the definition of "Ammunition" in the Gun Control Act and may not be dealt with without a license. 18 U.S.C. §921(a)(17).

Classification 12 and 13.

It will be convenient to consider these in reverse order.

As to classification 13 (containers of black sporting powder), the lower court properly found that appellant's possession of the powder was prohibited by 73 P.S. §151 et seq.[8], which regulates the storage of

8. Act of July 1, 1937, P.L. 2681, §1 et seq., as amended 73 P.S. §151 et seq.

explosives, and by Philadelphia City Ordinances §5-1001 et seq., which make it unlawful to possess in the city explosives in the amount taken from appellant's home. The explosives were therefore contraband per se and were correctly forfeited.

As to classification 12 (containers of sporting gun powder, which is smokeless and non-explosive), appellant seeks to distinguish this gun powder from the "explosive" gun powder regulated by statute and ordinance. We need not respond to that argument since the lower court properly found that appellant did not comply with the Act of March 20, 1856, P.L. 137, §6, 53 P.S. §16568, which establishes a statute of limitations on petitions for the return of gunpowder in Philadelphia. Since appellant did not file his petition for return of the gunpowder within the specified three months of time

seizure, his petition was properly denied and appellant cannot object to the gunpowder being forfeited.

Classification 6

The lower court found these items (knives, swords, and a machete) to be contraband and subject to forfeiture. However, the court cited only the Prohibited Offensive Weapons statute, Act of Dec. 6, 1972, P.L. ____, No. 334, §1, 18 Pa.C.S. §908, which become effective on July 6, 1973, well after the June, 1971, seizure of appellant's property. It may be that the court did not mean that appellant's possession in 1971 was prohibited, but, rather, was speaking to the fact that these weapons were contraband per se since return of them to appellant now would put him in violation of the law. However, this may be, we are unable to review the lower court's findings with

respect to this classification. Despite diligent efforts on part of the Superior Court Prothonotary, we have been able to procure only part of the record. The part we have does not include evidence with respect to classification 6. Nor do we have any findings of fact and conclusions of law by the lower court on this classification. We are compelled, therefore, to reverse the lower court's order as to the knives, swords, and machete and remand for findings of fact and conclusions of law with respect to this property.

The order of the lower court is affirmed except as regards the knives, swords, and machete, as to which the order is reversed and the case remanded for further proceedings consistent with this opinion.

HOFFMAN, J., did not participate in the consideration or decision of this case.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED EXCEPT AS REGARDS THE KNIVES, SWORDS, AND MACHETE, AS TO WHICH THE ORDER IS REVERSED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

BY THE COURT:

/s/
Prothonotary

Dated: February 18, 1977

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	Philadelphia District
GEORGE FASSNACHT, Appellant	:	705 October Term 1975

O R D E R

AND NOW, this 8th day of March, 1977, upon consideration of Appellant's Petition for Reargument, it is hereby ORDERED that the Petition for Reargument is denied.

Upon consideration of Appellant's Petition for Supersedeas, it is hereby ORDERED that if a petition for allocatur to the Supreme Court has been filed, the Order of Supersedeas previously entered by this court is reinstated, to remain in effect until the Supreme Court has acted on the petition. If no petition for allocatur has been filed, the Petition for Supersedeas is denied.

PER CURIAM

ORDERS OF THE SUPREME COURT
OF PENNSYLVANIA

Eastern District

Order endorsed on the Petition for Allowance of Appeal:

"August 5, 1977

Petition Denied

Per Curiam"

Order entered on the Application for Re-Consideration of Denial of Allowance of Appeal:

"April 4, 1978

Application Denied

Per Curiam".

COMMONWELATH OF PENNSYLVANIA : COURT OF COMMON PLEAS

v. : TRIAL DIVISION

GEORGE FASSNACHT : MISC. DIV. 74-00-2013

PETITION FOR RETURN OF PROPERTY

MEMORANDUM OPINION

On June 20, 1971, members of the Philadelphia Police Department seized and removed a vast quantity of weapons and munitions from the basement of Petitioner, Geroge Fassnacht's home at 528 Rhawn Street, Philadelphia, Pennsylvania. This "arsenal" consisted of, inter alia, almost two hundred pounds of gun powder and explosives, several hundred machine guns, rifles and pistols, and over 363,000 rounds of live ammunition. Thereafter, on June 24, 1971, petitioner was arrested and charged with trafficking in machine guns and possession of explosives with regard to these items and others recovered at 5414 Large

Street, Philadelphia, Pennsylvania. A Motion to Suppress Evidence was granted as to all the items discovered at 528 Rhawn Street; thereby precluding the Commonwealth's efforts to criminally prosecute petitioner for the possession of these items. On April 19, 1974, petitioner filed a Petition for the Return of the Property to which the Commonwealth answered and filed its Motion to Dismiss Petition for Return of Property. Thereafter, on July 16, 1974, this matter was heard on oral argument and held under advisement pending the submission of briefs. The matter is presently before this Court on Petitions and Answers and Supplemental Briefs thereto.

For purposes of clarity, reference will be made to the items sought to be returned by Petitioner as

follows:

(1) automatic weapons, machine guns and automatic pistols;

(2) six pistols with shoulder stocks, and one silencer for a pistol;

(3) destructive devices or explosives, plastic explosives, electrical squibs, T.N.T. and hand grenade fuses;

(4) rifles;

(5) knives, swords and a machete;

(6) ammunition;

(7) pyrotechnics and fireworks;

(8) weapon parts, including parts for machine guns and automatic pistols, as well as parts for regular rifles and pistols;

(9) ammunition magazines and ammunition clips for both automatic and regular weapons;

(10) items that the Commonwealth has agreed to return on July 18, 1974;

(11) containers of sporting gun powder;

(12) containers of black sporting powder.

Numerous cases from the federal and state courts have held that the mere fact that possession of forfeitable property was obtained by the government as the result of an unauthorized or illegal taking does not preclude its forfeiture. One 1958 Plymouth Sedan vs Commonwealth of Pennsylvania, 380 U.S. 693 (1965) and cases cited therein. The Supreme Court in United States vs Jeffers, 342 U.S. 48 (1951) and Trupiano vs United States, 334 U.S. 699 (1958) stated by way of dictum, however, since the point was not before it, that its ruling that the contraband was excludable as illegally seized did not mean that the Government was required to return the illegally imported narcotics to Jeffers or the unregistered still, alcohol and mash to Trupiano. The Court held in Plymouth Sedan, supra, that property is contraband per se, when the possession of

it without more constitutes a crime and what the return of such property to the defendant would subject him to criminal liability. These cases appear to be right on target with the issues that are before us and the return of the petitioned items would be legally inappropriate.

This proceeding is in rem since the property sought is considered contraband. Contraband, of course, are goods or articles whose use or possession are prohibited or against the law. The Commonwealth has adequately established that it was unlawful for petitioner to possess said articles: therefore, a "prima facie" case has been presented and the burden of proof shifts to the petitioner to show that possession of said articles was not unlawful. Pannulla vs Rosenberg, 171 Pa. Superior

Ct. 233 (1952) and Nu-Ken Novelty, Inc., vs Heller, 220 Pa. Superior Ct. 431 (1972). Petitioner has failed to rebut the Commonwealth's contentions. It is obvious to this Court that petitioner has done nothing more than make negative statements contra the Commonwealth's theories and propositions. There clearly is a paucity of case authorities or legal principles presented by petitioner. Petitioner admits that he is is not seeking the return of any property which is contraband or any property, the return of which would subject the petitioner to criminal liability. The assertion by petitioner, that the Commonwealth's legal argument on contraband are irrelevant, is specious. What petitioner fails to realize is that the Commonwealth correctly avers that all of the articles recovered are contraband except for those that the Commonwealth has agreed to return.

The possession of certain of said articles are prohibited by Pennsylvania and Federal statutes and therefore are forfeitable as contraband. Pennsylvania Statute, 18 C.P.S.A. §906, Prohibited Offensive Weapons, would apply to the items included in categories (1), (2) and (5) above. The Philadelphia Code §5-1004 pg. 310 explicitly provides, inter alia, that (1) no person shall have, keep or store explosives unless he has obtained a permit as provided in §5-4101. In addition, 73 P.S. §151 et seq contains the regulations pertaining to explosives. Both laws explicitly provide that the possession of items which fall into category (3) above is prohibited unless the possessor is licensed and said items duly registered. There has been testimony, by a custodian of record as to licensed dealers in explosives in the City of Philadelphia,

that petitioner did not possess the license as required by the City and the State. Petitioner admits that black sporting powder, category (12) above, is an explosive and that the City Ordinance prohibits storage of more than two pounds of such powder in one dwelling at a time. In addition, under the State Statute 53 P.S. §16568 (Suits for recovery of gunpowder, etc., seized) all actions or suits for recovery of any gunpowder shall be instituted within 3 months after such seizure shall have been actually made, and if not, said gunpower is absolutely forfeited. Since petitioner did not proceed in compliance with this statute, assuming arguendo that we found such gunpowder was not contraband, it still should not be returned.

Moreover, the possession of the items included in categories (1),

(2), (3) above is prohibited under federal statute. Roberta J. Carr, Supervisor of the Firearms Licensing Section in the Office of the Regional Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Mid-Atlantic Region, Philadelphia, Pennsylvania, submitted a written statement that provided in part:

> "Our records indicate that License #23-1210, bearing expiration date of April 19, 1969 was issued to George E. Fassnacht, 528 Rhawn Street, Philadelphia, Pennsylvania, 19111, under the provisions of the Federal Firearms Act (U.S.C. Title 15, Chapter 18.) Our records also indicate that Mr. Fassnacht's license expired on April 19, 1969 and that he did not reapply for a federal firearms license under the provisions of the Gun Control Act of 1968 (Title 18, U.S.C. Chapter 44, Section 921 et seq.) during the period from April 19, 1969 through July 15, 1974 anywhere within the geographic limits of the Mid-Atlantic Region which includes the states of Pennsylvania..."

This Court agrees with the Commonwealth's averment that "The nature, quantity and method of storage of the items that are contraband by statute and certain other items (the non-automatic rifles and ammunition, gun parts and magazines) establish that petitioner was an unlicensed dealer in firearms and ammunition, in violation of both Pennsylvania and federal laws covering both the licensing of the dealers and the storage of the items to be sold, and that these items are contraband" and therefore not subject to be returned.

There are specific federal and state laws to which the petitioner has obviously not complied. Many of these have been mentioned before, but this Court feels the necessity to indicate that petitioner has violated the following statutes pertaining to

the registration of dealers in firearms and explosives: 26 U.S.C.A. §5861, 26 I.R.S. §178 et seq., 18 U.S.C.A. §921 et seq., 18 U.S.C.A. §841 et seq., 18 P.S. §6112 et seq., 35 P.S. §1271 et seq., City Ordinance §5-1001 et seq., §10-814 et seq. We view, with skepticism, petitioner's claim that these items were a "reference collection". It has been settled that petitioner was not currently licensed as a dealer in firearms or ammunition either in Pennsylvania or with the Federal government as required by law, nor as a collector. The size of this "reference collection" is astounding. The quantity of weapons, explosives and other destructive devices are far in excess of what a collector would normally possess. Petitioner claims that he is not an ordinary collector but forensic ballistics expert who can be expected to require

a lifetime supply of all types of ammunition. We do not accept this argument, but in the alternative, assuming this is true, this Court cannot condone Petitioner's practices since they are in violation of criminal statutes. It can be reasonable inferred from the evidence in record that the only logical explanation for petitioner's possession of the "arsenal" is that he was an unlicensed dealer and not a collector.

The type, quantity and means of storage of these items were not in the best interest and welfare of the neighborhood or community. Petitioner has admitted that the black powder was not stored as required by federal law. The explosives were precariously stored next to the heater, and we feel that the cache of ammunition, if caused to explode, would be a veritable "bomb".

The premises, 528 Rhawn Street, is lcoated in a contiguous area comprised of residences, two elementary schools, two churches, a hospital, a home for the aged, and numerous other commercial premises. Certainly, it would be in the community's best interest to reduce the hazard to persons and property arising from the misuse and unsafe or insecure storage of these explosive materials. Petitioner has created a hazardous or physically offensive condition by an act which appears unlawful; therefore, this Court is disposed to order all the items (except those the Commonwealth has already agreed to return) forfeited to the Commonwealth.

In addition, a list of items, due to their identity as property of the United States Government, may be considered as contraband if the

petitioner cannot produce a receipt of sale. No evidence of the ownership of any of these items, or, for that matter, any of the items in the Commonwealth's possession has been produced. Petitioner has made bald allegations that the items taken from his home are his. This in itself is not enough.

Accordingly, it is therefore ORDERED AND DECREED that the Petition for the Return of Property is denied. Material is ordered destroyed.

BY THE COURT:

/s/ Hirsh
J.

Date: 6-6-75

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	JUNE TERM, 1971
V.	:	
GEORGE E. FASSNACHT	:	No. 2556

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O P I N I O N

DOTY,A.J. - - - - - - - - - - - - - - - -

This matter is before the Court for consideration of the Commonwealth's appeal from an Order dated October 27, 1972 of the Municipal Court of Philadelphia (Judge Murphy) granting defendant's motion "for the suppression of all evidence arising from the searches of premises 528 Rhawn Street and 5414 Large Street." In addition, the defendant also filed a petition to quash this appeal. Both the Commonwealth's appeal and the petition to quash the appeal were

originally filed in the Superior Court of Pennsylvania which refused defendant's petition to quash the appeal and remanded the Commonwealth's appeal to the Common Pleas Court of Philadelphia. See Commonwealth v. Hallowell, 223 Pa. Superior Court 440 (1973). After a careful consideration of the entire record and the applicable law, we are convinced that defendant's petition to quash the appeal must be denied. We are also convinced that the Commonwealth's appeal must be sustained in part and denied in part.

The thrust of defendant's petition to quash the appeal (and thus terminate this litigation) is based upon the defendant's assertion that defendant surrendered himself to the Philadelphia police on June 24, 1971 and more than two years has elspsed since that date without an indictment being returned against him: 19. P.S. 211. In the instant

case, any delay in indictment was due not to any fault of the Commonwealth but rather to pre-trial procedures utilized by the defendant himself. Therefore he should not be heard to complain that he has not yet been indicted. We do not say this in criticism; a defendant has the perfect right to utilize certain pre-trial procedures to test the propriety of his arrest, the validity of the search and seizure, and a confession obtained by the police, etc. However, when the delay in obtaining an indictment is necessitated by the filing of such pre-trial petitions, and the court's consideration thereof, it would be manifestly unfair to deprive the Commonwealth of its duty to bring the defendant to trial.

Moreover, a motion to quash an indictment by its very nature is filed after an indictment is returned by the grand jury.

Furthermore, no indictment is obtained in criminal proceedings which are commenced in the Municipal Court of Philadelphia. Originally a defendant is brought to trial in that court and his motion to suppress the evidence is heard at the time of his trial. In this case because of the complexity of issues presented by the defendant's pre-trial motion (there were over one thousand pages of testimony taken in consideration of this motion) a great deal of time had to be given for the proper consideration and disposition of the motion. Therefore, we are firmly of the opinion that these proceedings in the Municipal Court tolled the running of the statute of limitations. Under all of these circumstances, defendant's petition to quash must be denied.

In consideration of the appeal itself, no purpose would be served by repeating

the entire factual background in this matter. This has been stated most ably by Judge Murphy in his opinion which accompanied the order hereinabove referred to. Suffice to say for the purpose of this appeal, the Philadelphia Police Department on June 19, 1971 at approximately 9 P.M. received information which led them to believe that explosives were stored in the basement of 5414 Large Street, Philadelphia. Nevertheless, it was not until approximately midnight when a detective was assigned to secure a search and seizure warrant for that premises and was not until 2:30 A.M., on June 20, 1971 that the warrant was secured.

Certain members of the Philadelphia Police Department then proceeded to 5414 Large Street arriving at approximately 3 A.M. They announced themselves to Miss Marie Tobin, one of the occupants of that premises and

and presented her with a copy of the search warrant. Miss Tobin told the police "you do not need it, you can go anywhere you want".

In connection with the search of the Large Street property and seizure of the items therein we conclude as a matter of law: (1) that the police possessed a valid search and seizure warrant based upon probable cause; (2) that the police received valid consent from one of the occupants to enter and search the premises.

In view of these conclusions, it is unnecessary for us to consider the Commonwealth's contention that the defendant lacks standing to question the validity of this search and seizure, since he neither resided nor was present herein at the time, although we were inclined to agree with the Commonwealth's contention in this regard. See

Jones v. United States, 363 U.S. 257 (1960).

Resuming our narrative for the purpose of this opinion, when the police went to the basement of the Large Street premises they observed two cartons and upon opening the cartons they found therein a Thompson sub-machine gun and some other automatic weapons. The police had been informed by Miss Tobin that Mrs. Jane Fassnacht (defendant's wife) and the defendant had stored various items (the contents which were unknown to Miss Tobin) in the Large Street basement prior to the evening in question. The police were also informed that on the evening of June 19, 1971 Miss Tobin and two friends came to the Large Street property and removed everything which had been stored there except the two cartons previously referred to.

Although the police had arrived at the Large Street property at 3 A.M., on

June 20, 1971 and had examined the contents in the basement of that property at that time, they did not go to the 528 Rhawn Street, Philadelphia until at least 4:30 A.M., that morning and some testimony indicates that the police did not arrive at the Rhawn Street property until at least 5 A.M. At this point we quote verbatim from Judge Murphy's opinion:

> "Although the police arrived at Large Street at approximately 3:00 A.M. (N.T. p. 730), and although Miss Tobin had called Mrs. Fassnacht the previous evening, Sergeant McLaughlin explains the delay in proceeding to 528 Rhawn Street by stating that Miss Tobin did not know Mrs. Fassnach's exact address and took approximately twenty minutes to find her telephone number. He then called Detective Captain Royds at the Night Command for the street address at about 3:30 A.M. and received it about five minutes before they left the house (N.T. p. 757) at about 4:00 A.M. (N.T. p. 770).
>
> Although the police knew at 9:00 P.M. on June 19, 1971 that explosives were stored at 5414 Large Street, and had received this information from what they considered a reliable source, no

assignment of the case was made until 12:05 A.M. on June 20, 1971 and no action was taken until 3:00 A.M. when they had obtained and served a Search Warrant on Miss Tobin.

Prior to leaving Large Street, Sergeant McLaughlin had discussed with Captain Royds the obtaining of a Warrant for Rhawn Street but felt it better to move immediately (N.T. p. 761) even though there would be no more nor no less a danger at the Fassnacht resident than at Tobin's. Moreover, Captain Royds had all the information necessary to obtain a Warrant. For some reason the Sergeant now considered it an emergency, "extremely so" (N.T. p. 756) and action had to be taken immediately because of a cellar-full of arms and explosives (N.T. p. 769). The word "cellarful" was explained to be mistake in his wording. However, the police knew they were on tenous ground, for the Sergeant admits "without permission; I knew I needed a Search Warrant". (N.T. p. 800). In fact, the police really did not plan any search unless they could get consent. (N.T. p. 812).

It is axiomatic that in the absence of an "emergency situation", a search to be valid must rest upon one of three grounds. One, it must be incident to a valid arrest. There was

no arrest of Mr. Fassnacht or anyone else in this case at that time (the defendant was not present in the house at the time of the search and seizure). Two, the search must be pursuant to a valid warrant based upon probable cause. The Commonwealth concedes that the police did not have a warrant at the time of the search. Three, the search must be pursuant to an intelligent and voluntary consent. We conclude as a matter of law that there was no valid consent given by Mrs. Fassnacht in this case. Sergeant McLaughlin, one of the police officers, who proceeded to the Rhawn Street property, stated that he knocked on the door and when Mrs. Fassnacht appeared in her nightclothes, he identified himself. The sergeant admitted that Mrs. Fassnacht told him that he would need a warrant to enter

the premises. Moreover, Officer Zalenski testified before Judge Murphy and stated that he had gone to the premises independently of Sergeant McLaughlin and also acknowledged that Mrs. Fassnacht had said to him, "I think it would be better if you got a warrant" (N.T. p. 31). Captain Murphy of the police department also acknowledged that he heard Mrs. Fassnacht advise the officers that they better get a warrant before she would permit them to search the premises.

At the hearing before Judge Murphy, Mrs. Fassnacht, who was eight and one-half months pregnant on the evening in question, stated that police officers arrived at her home at approximately 5 A.M. She stated that despite her repeated requests that the officers obtain a warrant, several officers remained in her house

at all times; that at no time (contrary to the officers' testimony) did they all leave and then return. She was quite emphatic in stating that she never gave police permission to enter and search her premises.

The Commonwealth's brief presented to this Court contains this statement:

> "For the purpose of this appeal, it is unimportant how the police secured entry and permission to search 528 Rhawn Street. The court below Ruled as a matter of fact and credibility that Mrs. Fassnacht did not consent to the search. It is undisputed that the police had no search warrant when they arrived at 528 Rhawn Street and it is undisputed as well that police were admitted to the house itself by Mrs. Fassnacht. Mrs. Fassnacht denied, however, that she agreed to the search of the cellar".

We do not agree with the Commonwealth's statement that the actions of the police in securing entry to premises 528 Rhawn Street are unimportant. Of course, the

facts do bear out the Commonwealth's statement that there was no search warrant and that Mrs. Fassnacht denied that she agreed to the search of the cellar.

In connection with the search and seizure of items at 528 Rhawn Street, we made the following conclusions of law: (1) the police had no warrant when they entered and searched that premises; (2) the search of premises and seizure of items contained therein was not incident to a lawful arrest; (3) no valid consent was given by Mrs. Fassnacht to the search of that premises or seizure of the items contained therein.

The Commonwealth virtually concedes these three conclusions but strenuously contends that the search of the defendant's Rhawn Street property was justified on the ground that the police were faced with

the "emergency situation" which presented "exceptional circumstances" justifying the search. We cannot agree with this contention. As stated hereinabove, the police were in possession of certain knowledge at 9 P.M., on the evening of June 19, 1971. By 3 A.M., the following morning they had verified this knowledge by a search of the Large Street property and were in possession of further knowledge concerning certain items in the defendant's Rhawn Street property. Nevertheless, they did not proceed to the Rhawn Street property immediately not did they arrive there until one and a half to two hours later.

Moreover, a great number of police officers were in and out of the Rhawn Street premises from approximately 5 A.M., on June 20, 1971 until all the contents

were removed. The process of removing these contents did not begin until 10 A.M., and was not completed until 7 P.M., that evening. Mrs. Fassnacht herself did not leave the property until sometime in the mid-morning of June 20, 1971. In addition the police spent sometime on the premises examining the contraband and there was even a police photographer at the premises taking photographs of the contraband during this entire period. Under these circumstances it is extremely difficult, to say the least, to come to a conclusion that the police themselves believed an emergency situation existed at 528 Rhawn Street on June 19-20, 1971. On the contrary, we conclude as a matter of law that no such emergency situation existed which would justify a search of these premises.

We concur entirely with Judge Murphy's conclusion on this point.

Therefore, while the search of the 5414 Large Street and seizure therein was proper, the subsequent search of defendant's property at 528 Rhawn Street was constitutionally impermissible and items seized therein must be suppressed.

Accordingly, and for the foregoing reasons, we enter the following:

O R D E R

AND NOW, to wit, this 8th day of November, 1973 the defendant's motion to quash the Commonwealth's appeal from the order of the Municipal Court of Philadelphia dated October 27, 1972 is denied. The Commonwealth's appeal from that order is granted in regard to the search of premises 5414 Large Street, Philadelphia, Pennsylvania and the items seized therein

may be used in evidence at defendant's forthcoming trial. The Commonwealth's appeal to suppress all items found in premises 528 Rhawn Street, Philadelphia, Pennsylvania is denied; those items found therein are hereby suppressed and may not be used in evidence at defendant's forthcoming trial. This matter is remanded to the Municipal Court of Philadelphia for trial in accordance with the foregoing opinion.

BY THE COURT:

/s/ (s) Doty
A.J.

Ethan Allen Doty,
Administrative Judge